No. 221

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

SKELLY OIL COMPANY, ET AL, *Petitioners*

VS.

PHILLIPS PETROLEUM COMPANY, *Respondent*

ADDITIONAL ARGUMENT BY MAGNOLIA PETROLEUM COMPANY

INDEX

AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 221

SKELLY OIL COMPANY, ET AL, *Petitioners*

VS.

PHILLIPS PETROLEUM COMPANY, *Respondent*

ADDITIONAL ARGUMENT BY MAGNOLIA PETROLEUM COMPANY

This argument is directed to the point that the trial Court erred in overruling the motion filed by Magnolia Petroleum Company (hereafter called Magnolia) to quash the service and dismiss for improper venue and for want of jurisdiction over the person of this petitioner; and it is intended also to show that this Court should not sustain respondent's contention that if the action is dismissed as to Skelly Oil Company (hereafter called Skelly) and Stanolind Oil and Gas Company (hereafter called Stanolind) for want of jurisdiction over the subject-matter jurisdiction nevertheless should be retained over Magnolia because of diversity of citizenship and decide on the merits.

Statement

Magnolia is a Texas corporation. Skelly, Stanolind and respondent are Delaware corporations. (R. 3-4.)

A motion to quash service and dismiss for improper venue and for lack of jurisdiction over the person was filed by Magnolia (R. 99-100). It was alleged in the motion: (1) that respondent invoked jurisdiction upon the allegation that the action involved a federal question; (2) that Magnolia was not an inhabitant of the Northern District of Oklahoma within section 51 of the Judicial Code, as amended, that it was licensed to do business in Oklahoma under section 452, Title 18, Oklahoma Statutes, 1941, with an agent for service residing in Oklahoma City upon whom service could be had "only in an action brought in the county of the State of Oklahoma in which the cause of action arose"; and (3) that the claim asserted was not in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences as the right asserted against Skelly and Stanolind, and venue as to Magnolia was not controlled by section 52 of the Judicial Code. Magnolia also moved to sever (R. 103) on the ground that joinder of Skelly, Stanolind and Magnolia in one suit was not proper or authorized by Rule 20(a) of the Rules of Civil Procedure for District Courts of the United States. These motions were filed on September 4, 1947 (R. 103).

Skelly and Stanolind also filed motions that they be dropped from the suit or to sever (R. 65, 96), and to dismiss or abate because of the pendency of sep-

arate suits filed by them in a Texas Court (R. 67, 97) involving the issues involved in this action, and which suits had been removed by respondent to the District Court of the United States for the Western District of Texas, Austin Division. (The cases were remanded to the State Court.)

Respondent opposed the above described motions of Skelly, Stanolind and Magnolia. They were heard on August 29, 1947 (R. 107) and overruled by order filed November 24, 1947 (R. 107).

Respondent filed an amended complaint on September 27, 1947, alleging that "as to defendant Magnolia Petroleum Company the Court has jurisdiction because of diversity of citizenship." (R. 103-104.)

The contract between Magnolia and respondent involved in this suit affected lands, and gas to be produced from lands, in Sherman and Hansford Counties, Texas (R. 58-59). The contract provided that it was to be performed by Magnolia in Texas (R. 41).

The contract was brought to Dallas, Texas, by respondent's agent where it was signed by Magnolia. The copy thus executed was taken by respondent's agent to Bartlesville, Oklahoma, to be signed by respondent. It is apparent from the record that respondent selected the mails as its method of sending its acceptance in the way of the signed contract to Magnolia. (R. 255-257.) The contract executed by respondent was received by Magnolia in the mail in Dallas, Texas. The telegram notifying respondent of the termination of the contract by Magnolia was sent from Dallas, Texas.

Argument

For the purpose of the following argument, the important facts are: that Magnolia was licensed to do business in Oklahoma under section 452, Title 18, Oklahoma Statutes, 1941; that the contract between Magnolia and respondent was executed by respondent at Bartlesville, Oklahoma, and an executed copy returned to Magnolia at Dallas, Texas, by mail; that the contract provided for performance by Magnolia at the mouths of gas wells in Texas; and that the position taken by Magnolia that the contract was subject to termination was taken at Dallas, Texas, and the telegram so advising respondent was sent from Dallas.

It is only in virtue of the fact that Magnolia had taken out a permit to do business in Oklahoma that respondent can contend that Magnolia was subject to suit in the United States District Court in the State of Oklahoma.

Neirbo Co. et al vs. Bethlehem Shipbuilding Corp., Ltd., 308 U. S. 165, and *Mississippi Publishing Co. vs. Murphree*, 326 U. S. 438, are authority for the proposition that a corporation by taking out a permit to do business in a foreign state and designating, in conformity with valid laws of the state, an agent upon whom service of court process may be had, consents to be sued in courts sitting in such foreign state which apply the laws of such state. Apparently this principle of waiver applies only in diversity cases. (*American Chemical & Paint Co. vs. Dow Chemical Co.* (6th Cir.), 161 F. (2d) 956; *Blaw-Knox Co. vs. Lederle* (6th Cir.), 151 F. (2d) 973; *Bulldog Elec-*

tric Products Co. vs. Cole Electric Products Co. (2nd Cir.), 134 F. (2d) 545; *Carbide & Carbon Chemical Corp. vs. United States Industrial Chemicals, Inc.* (4th Cir.), 140 F. (2d) 47.)

It is only upon this principle of waiver that respondent could contend that the venue was good as to Magnolia, a Texas corporation. The extent of the waiver is necessarily to be measured by the laws of the foreign state with which the corporation has complied in qualifying to do business there. The limitations, if any, which such laws place upon the waiver which they require as a condition to doing business in the state should be held to determine the limits of the waiver.

Section 452, Title 18, Oklahoma Statutes, 1941, provides that a foreign corporation when qualifying to do business in Oklahoma, shall

> * * * "appoint an agent who shall be a citizen of the state and reside in the state capital, upon whom service of process may be made **in any action in which said corporation shall be a party; and action may be brought in any county in which the cause of action arose, as now provided by law.**"*

The above quoted language was before the Supreme Court of Oklahoma in *Osage Oil & Refining Co. vs. Interstate Pipe Co.*, 253 P. 66, 69. There the language was construed to contemplate only causes of action arising in the state of Oklahoma and to fix

*All emphasis is supplied unless otherwise indicated.

venue as to such causes of action. The language of the Supreme Court of Oklahoma is as follows:

> "That section 5436, Id., has application only to causes of action against foreign corporations where the cause of action arose within the state is clearly evident from the language of section 1 of the original act, of which section 5436, Id., was section 3. That portion of said section 1 material to be considered here is now section 5433, Comp. Stat. 1921, and reads:
>
> "'Every foreign corporation shall, before it shall be authorized or permitted to transact business in this state or continue business therein, if already established, by its certificate under the hand of the president and seal of the company, appoint an agent who shall be a citizen of the state and reside at the state capital, **upon whom service of process may be made in any action in which said corporation shall be a party; and action may be brought in any county in which the cause of action arose, as now provided by law.** Service upon said agent shall be taken and held as due service upon said corporation; and such certificate shall also state the principal place of business of such corporation in this state, with the address of the resident agent.'
>
> "Since section 1 of Article 1, c. 10, S. L. 1909 (section 5433, supra), **only had in contemplation** and only purported to fix venue of actions arising within the state against foreign corporations, it must follow logi-

cally and as a necessary corollary that in providing in section 3 of that act how service of process might be obtained such provisions for service had reference only to the character of actions authorized by section 1. Section 3 of that act is now section 5436, Comp. Stat. 1921, and reads:

> " 'In all cases where a cause of action shall accrue to a resident or citizen of the state of Oklahoma, by reason of any contract with a foreign corporation doing business in this state, or where any liability on the part of such foreign corporation shall accrue in favor of any citizen or resident of this state, whether in tort or otherwise, and such foreign corporation has not designated an agent in this state upon whom process may be served or has not an officer continuously residing in this state upon whom summons or other process may be served so as to authorize a personal judgment, service of summons or other process may be had upon the Secretary of State, and such service shall be sufficient to give jurisdiction of the person to any court in this state having jurisdiction of the subject-matter, whether sitting in the county where the Secretary of State is served or elsewhere in the state.'

" "This language clearly and unequivocally limits the benefits of the substituted service therein authorized to 'a resident or citizen of the state of Oklahoma.' The language, 'In all cases where a cause of action shall accrue . . . by reason of any con-

tract with a foreign corporation doing business in this state,' coupled with the language of section 5433 that 'action may be brought in any county in which the cause of action arose,' both sections being parts of the same legislative act, demonstrates clearly that the character of actions contemplated by the Legislature were those only which might arise in some county of the state growing out of a contract between a resident or citizen and a foreign corporation doing business in the state, such contract being entered into and being performable in some county of this state. This language does not purport to, nor is it susceptible of a construction which would, confer jurisdiction on the courts of this state to determine causes of action against foreign corporations which arose wholly without the state and on substituted service. Such purported authority to the courts would be clearly unconstitutional as being a denial of due process, and all proceedings pursuant thereto would be absolutely void."

In *Oklahoma Packing Co vs. Oklahoma Gas & Electric Co.*, 100 F. (2d) 770, 773, 774-775, the same statute was before the United States Court of Appeals for the Tenth Circuit. From that case the following is quoted:

"Section 130, O. S. 1931, 18 Okl. St. Ann. sec. 452, which has been in effect since June 10, 1909, in part reads as follows:

" 'Every foreign corporation shall, before it shall be authorized or permitted to transact business in this State

. . . appoint an agent who shall be a citizen of the State and reside at the State capital, upon whom service of process may be made in any action in which said corporation shall be a party; and action may be brought in any county in which the cause of action arose . . . .'"

* * *

"'Here, the provisions of the Oklahoma Constitution and statutes respecting the admission of foreign corporations to do business in the state provided that such corporations may be sued in the county in which the cause of action arose. By complying with those provisions and obtaining a license to transact a local business in Oklahoma, the Delaware Company did more than appoint a statutory agent for service of process; **it assented to be sued in any court, state or federal, whose territorial jurisdiction embraced the county in which the cause of action arose.** The cause of action here sued on arose in Oklahoma County. The Western District of Oklahoma embraces that county and a regular term of the court is held at Oklahoma City in that county. We conclude that the Delaware Company, by complying with the provisions of Oklahoma law respecting the domestication of foreign corporations, waived its right to object to the venue of the court and consented to be sued in the District Court of the United States for the Western District of Oklahoma.'"

The latter case (*Oklahoma Packing Co. vs. Oklahoma Gas & Electric Co. et al*, 309 U. S. 4, 7) reached this Court, and concerning the holding of the lower Court with respect to the consent involved in a foreign corporation's taking out a permit to do business in Oklahoma, this Court said:

> * * * "Prior to this suit, Wilson & Co. had, agreeable to the laws of Oklahoma, designated an agent for service of process 'in any action in the state of Oklahoma.' Both courts below found this to be in fact a consent on Wilson & Co.'s part to be sued in the courts of Oklahoma **upon causes of action arising in that state.** The Federal District Court is, we hold, a court of Oklahoma within the scope of that consent, and for the reasons indicated in Neirbo Co. v. Bethlehem Ship Building Corp., 308 U. S. 165, Wilson & Co. was amenable to suit in the Western District of Oklahoma."

Section 452 of the Oklahoma statutes then means that a foreign corporation which qualifies to do business in the state may be sued on causes of action arising in the state of Oklahoma and service of process may be had upon its agent; and the "action may be brought in any county in which the cause of action arose, as now provided by law."

Whether the term "cause of action arose, as now provided by law" refers to causes of action as now provided for or recognized by the laws of Oklahoma or to venue as now provided by the laws of Oklahoma, in so far as this case is concerned, the statute reaches the same end. For, if it means causes of action as

now provided and recognized by the laws of Oklahoma, then it refers to causes of action which arise under the laws of Oklahoma, or causes of action recognized thereby and triable in Oklahoma state courts. If it means venue as now provided by the laws of Oklahoma; that is, causes of action for which venue is now provided by the laws of Oklahoma, then obviously it refers to causes of action provided for or recognized by the laws of Oklahoma (arising under the laws of Oklahoma) as to which venue is provided by law, for certainly the laws of Oklahoma do not provide venue for suits on any cause of action except such as arise under or are recognized by the laws of Oklahoma and are triable in the courts of Oklahoma.

Certainly by the statute the Legislature of Oklahoma was not attempting to provide for service in suits on causes of action arising under the laws of foreign states or in suits on causes of action arising under the laws of the United States which could not be tried in an Oklahoma state court. The clear implication of the statute is that the Legislature had in mind service upon causes of action which arise under the laws of Oklahoma and are recognized by those laws. Certainly beyond that field the Legislature of Oklahoma was not attempting to effect service, venue or jurisdiction.

An action which could not be tried in an Oklahoma court would not be within the statute or the waiver. Such is the effect of the cited cases.

Respondent's action is for a declaratory judgment. The laws of Oklahoma do not recognize any such procedure. This suit could not have been maintained

against any of petitioners in the Oklahoma state courts. So, the controversy which plaintiff alleges cannot be regarded as a cause of action under the laws of Oklahoma, and no venue is fixed by the laws of Oklahoma for such an action. In view of the construction placed upon the statute by the Supreme Court of Oklahoma, it cannot be said that Magnolia by qualifying to do business in Oklahoma consented to be sued in the District Court of the United States for the Northern District of Oklahoma in this action for declaratory judgment.

The test of a venue is not what remedy respondent might have pursued under the alleged facts, but what remedy did it elect to pursue and what relief does it seek. The remedy which it elected to pursue is one which is unknown to the laws of Oklahoma, and the relief which it seeks is a type of relief which the Oklahoma courts do not have power to grant. The case alleged in the complaint is one which the Oklahoma laws do not recognize and one over which the Oklahoma courts do not have jurisdiction. Certainly, it cannot be assumed or inferred that the Oklahoma Legislature intended section 452 to apply to cases which are not within the jurisdiction of any Oklahoma state court.

The wrong which respondent claims is the position taken by Magnolia and the sending of the telegram. If the existing facts justify the termination of the contract, then no wrong was committed in the sending of the telegram. But, if the facts did not justify the sending of the telegram and if a wrong were committed, it was committed in Dallas County, Texas. It was in Dallas County, Texas,

not Oklahoma, that Magnolia took the position that the contract was subject to termination and it was from there that the telegram was sent. Respondent alleges that a controversy was thereby brought into being, if so, it resulted from what was done in Dallas County, Texas, not Oklahoma.

Respondent has not elected to treat Magnolia's action as repudiation or breach of the contract; and, on the contrary, respondent contends that the contract is still in force, that the right to terminate it did not exst; and it asks for judgment so declaring.

There being no claim of breach of the contract, it appears unnecessary to discuss at any length the place of the contract or the place of performance. It seems sufficient to say that the contract was completed upon Magnolia's receipt of respondent's acceptance, which acceptance came in the form of a signed instrument sent by mail, a means of communication adopted by respondent, and the acceptance was received in Dallas, Texas; that hence it was in Dallas where the final assent was in legal effect given; and that the contract was to be performed by Magnolia by delivering gas at the mouths of the wells on its leases in Sherman and Hansford Counties, Texas. Under the laws of Oklahoma (*McCraw vs. Simpson* (10th Cir.), 141 F. (2d) 789; *Collins vs. Holland*, 169 Okla. 10, 34 P. (2d) 587; *Sheehan Const. Co. vs. State Commission*, 151 Okla. 272, 3 P. (2d) 199) and under the laws of Texas (*Ryan & Co. vs. M. K. & T. Ry. Co.*, 65 Tex. 14, 16; *Fidelity Mutual Life Assn. vs. Harris*, 94 Tex. 25, 57 S. W. 635) it appears that Texas is the place of the contract, and that causes of action for breach

by Magnolia would be referable to Texas and not Oklahoma.

The cause of action, if any respondent has, arose in Texas and not in Oklahoma. On the face of section 452, Title 18, Okla. Stat., 1941, and as the language has been construed by the Supreme Court of Oklahoma, the waiver involved in Magnolia's having taken out a permit to do business in Oklahoma does not apply to a cause of action which arose in Texas. *Neirbo Co. et al vs. Bethlehem Shipbuilding Corp., Ltd., supra*; does not purport to extend the waiver implied from a corporation's qualifying to do business in a foreign state beyond the limits which the state law imposes upon the waiver. This was recognized in *North Butte Mining Co. vs. Tripp* (9th Cir.), 128 F. (2d) 588, where a citizen of Illinois sued the mining company, a Minnesota corporation, in the District Court of Montana upon a judgment obtained in a United States Court in Minnesota. Jurisdiction was founded on diversity of citizenship. The statute under which the mining company qualified to do business in Montant provided that a corporation entering the state thereunder consented to be sued in the courts of the state upon causes of action arising against it in the state. In that case the Court cited both the *Neirbo* case, *supra*, and the *Oklahoma Packing Company* case, *supra*, and held that the Montana statute applied only to causes of action arising in Montana, that the case was to be distinguished from the *Neirbo* case, and remanded the mining company's appeal with direction that its motion challenging the venue be sustained.

Magnolia understands that effective September 1, 1948, Title 28, United States Code, Section 1391, made changes in what were formerly sections 50 and 51 of the Judicial Code, as amended (28 U.S.C., secs. 111, 112). However, that cannot affect the facts that at the time the trial Court on November 24, 1947, overruled Magnolia's challenge of the venue (R. 107), Magnolia was entitled to an order sustaining its motion, and that the trial Court erred to the prejudice of Magnolia.

Now respondent urges that if the trial Court did not have jurisdiction of the action against Skelly and Stanolind because of the absence of a federal question that would give jurisdiction as to those petitioners, that nevertheless this Court should retain jurisdiction in so far as Magnolia is concerned because of diversity of citizenship, and decide the case on its merits. The cases which respondent cites to support its position that jurisdiction in such event may be so retained as to Magnolia, and particularly *Camp vs. Gress*, 250 U. S. 308, 317, conditions the propriety of such action upon the absence of prejudice.

Prejudicial error was committed by the trial Court in overruling Magnolia's motion attacking the venue and Magnolia was made to stand trial in a district and circuit where it could not have been made to stand trial except for such error. Now respondent would compound that error by having this Court, if it holds that the respondent's case did not involve a federal question, retain jurisdiction as to Magnolia. Such an action would not be within the spirit of the rule upon which respondent relies.

WHEREFORE, Magnolia submits that, since the action did not involve a federal question upon which respondent could found jurisdiction in the trial Court, the action should be dismissed as to all petitioners.

Respectfully submitted,

WALACE HAWKINS
EARL A. BROWN
RAYMOND M. MYERS
Magnolia Building
Dallas, Texas

W. R. WALLACE
Magnolia Building
Oklahoma City,
Oklahoma

DAN MOODY
Austin, Texas

Attorneys for Magnolia Petroleum Company.